

Boston College Law School

From the Selected Works of Katharine G. Young

2012

Redemptive and Rejectionist Frames: Framing Economic, Social, and Cultural Rights for Advocacy and Mobilization in the United States

Katharine G. Young, *Boston College Law School*

Available at: https://works.bepress.com/katharine_young/15/



Redemptive and Rejectionist Frames: Framing Economic, Social, and Cultural Rights for Advocacy and Mobilization in the United States

*Katharine G. Young**

I. Introduction

“Rights talk” can combine with “law talk” in a myriad of ways, just as advocacy and mobilization strategies can adopt a multitude of attitudes towards law. Within the United States, and across the world, the economic, social, and cultural rights frame is neither fixed nor uniform. This article examines how framing claims to material interests as rights—such as the rights to access food, water, health care, housing, and education—can coexist with multiple stances towards law and towards the state. Applying the constitutional theory of Robert Cover to current legal arrangements, it describes two such orientations: the “redemptive” frame and what I term its “rejectionist” alternative.¹

Redemptive frames can be understood as those that seek to reinterpret or change laws to emphasize incipient constitutional, statutory, common law, and international protections of economic, social, and cultural rights. Rejectionist frames, on the other hand, expose the lack of legal protections under current constitutional, statutory, common law, or internationally binding arrangements. The first frame proposes a way forward within current legal institutions, but may be vulnerable to co-optation by the very institutions in which change is sought. The second frame opposes the current structures of law and the state yet may be no less immune from co-optation. Like the notions of accommodation versus resistance, or of amelioration versus opposition, these concepts serve as heuristics to facilitate our

* Senior Lecturer of Law, Australian National University College of Law. S.J.D. 2009 (Harvard); B.A./LL.B. (Hons) (University of Melbourne).

1 Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 33–40 (1982) (describing a version of “redemptive constitutionalism” and its alternative in the history of U.S. constitutional advocacy).

understanding of the assumptions that undergird particular strategies of mobilization or advocacy, each sharing features of its apparent counterpart.

The alternative frames of redemption and rejection may be observed in comparative and international advocacy around economic, social, and cultural rights. This article examines their applicability in the United States. Part I describes the common features of the economic, social, and cultural rights frame and demonstrates the normative openness that remains in the use of rights discourse. Part II provides a summary of the elements of redemption and rejection that may accompany claims of economic, social, and cultural rights, extending Cover's constitutional theory to sub-constitutional and international legal domains. Part III applies the redemptive/rejectionist distinction to current movements within the United States, including the Occupy Wall Street movement. It reveals the tensions between the agendas of redemption and rejection and the potential challenges of each for advocacy and mobilization around economic, social, and cultural rights.

II. Frames Within A Frame

The concept of framing, drawn from sociology, is useful to the study of economic, social, and cultural rights and law.² A frame acts as an interpretive lens, which guides people to see the world differently and compels them to act according to that new understanding.³ The act of framing also helps social actors communicate their interests to others.⁴ A frame can thus unite actors, discredit opponents, persuade bystanders, and change minds. Frames may also be determinative. As lawyers know well, the choice of frame often determines the answer to a dispute. In U.S. constitutional law, for example, a complaint about discrimination in the provision of a public education benefit

2 Katharine G. Young, *Freedom, Want and Economic and Social Rights: Frame and Law*, 24 MD. J. INT'L L. 182, 191–96 (2009) [hereinafter Young, *Frame and Law*] (using framing concepts to propose an understanding of economic and social rights that connects their use in political discourse and in positive law).

3 David A. Snow, *Framing Processes, Ideology, and Discursive Fields*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 380, 390, 393 (David A. Snow et al. eds., 2004).

4 *See id.* at 404.

may succeed, as it did in *Plyler v. Doe*,⁵ while a claim to a “fundamental right” to education may fail, as it did in *San Antonio Independent School District v. Rodriguez*.⁶ This is despite the importance of education to the underlying facts in both cases.⁷

Moreover, a frame can outline an entire theory and practice of social and legal change—precluding certain options, inviting others, and translating ideologies into expectations and visions of social reality, and the changeability of that reality. In particular, the “rights” frame accompanies a certain, if unfixed, conception of human dignity or worth, which justifies an individual’s claims against her or his political community.⁸ As I have suggested elsewhere, the success of the rights frame lies in the way in which it presents a universalized language to claims for material protections and ensures that these claims are based on obligations rather than entreaties.⁹ First, the reliance on human dignity, freedom, or equality as the basis for economic, social, and cultural rights appeals to universal values that all people may share, even if their particular formulations differ considerably across individuals and groups. The inclusiveness of this language can unite previously diverse actors (apparently separated by religion, race, or other characteristic) under single claims, which can constitute a significant defense against the often-polarizing nature of distributive politics.¹⁰ Indeed, some have suggested that distributive politics has a latent anti-solidaristic and fragmenting

5 457 U.S. 202 (1982) (holding that a Texas statute withholding education funds for undocumented noncitizen children and authorizing local school districts to deny enrollment to such children violates the Equal Protection Clause of the Fourteenth Amendment).

6 411 U.S. 1 (1973) (denying a fundamental right to education).

7 See LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 93–102 (2004) (explaining this outcome with a thesis of “underenforcement” of economic and social rights and suggesting that while a constitutional right to adequate education underlies the decision, the right must first be fulfilled by local, state, and federal legislators before a court can enforce it).

8 See Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315 (2004) (describing the analytical steps that join a conception of human dignity with the obligations of others to respect it).

9 Young, *Frame and Law*, *supra* note 2, at 192–94.

10 *Id.* at 192 (discussing the findings of JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 162–66 (2005), which describes the more effective unification of a Latino immigrant group through the use of rights language rather than faith traditions or class solidarity).

structure, which the rights frame may be able to overcome.¹¹ In this setting, the inclusiveness of the rights discourse operates precisely against the characteristics that may otherwise divide claimants.

The language of rights also points to the correlative language of duties, and therefore raises an agent-duty-holder relationship.¹² Unlike development goals, or philanthropy, the claimant demands action from others for the responsibility they bear—most often, from the state.¹³ As with civil and political rights, the duties correlated to economic, social, and cultural rights may take positive, as well as negative, forms.¹⁴ Thus, applying the frame of rights to a condition such as hunger, illiteracy, homelessness, or easily preventable or curable ill-health may help to foreground the social-structural causes of the problem (or, in normative terms, disclose an entrenched injustice) and suggest different objects of recourse and remedy.¹⁵

By invoking the material objects of their concern—health, health care, education, food, water, housing, work—economic, social, and cultural rights offer a frame that appeals to the long-standing interests that are familiar to us. These interests form the basis of advocacy and mobilization for many diverse social actors. Labor unions contest remuneration policies and workplace conditions. Patient support

-
- 11 Günter Frankenburg, *Why Care?—The Trouble with Social Rights*, 17 *CARDOZO L. REV.* 1365, 1377 (1996) (describing the rivalries between disenfranchised groups and “vested groups” and between disenfranchised groups and other disenfranchised groups that are created by a market society).
- 12 For a robust conceptualization of claim rights and their correlative duties, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 31–32 (1913). Oftentimes, however, the discourse of rights is looser than Hohfeld’s tight analytical structure, see, for example, DAVID ENGEL AND FRANK MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* (2003) (proposing a recursive theory of rights and identity).
- 13 Jeremy Waldron, *Rights and Needs: The Myth of Disjunction*, in *LEGAL RIGHTS* 87, 96–100 (Austin Sarat & Thomas R. Kearns eds., 1996) (drawing attention to the benefits of “rights claims” over “needs claims”).
- 14 See, e.g., HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY* 35–40 (2d ed. 1996) (arguing that subsistence rights have both positive and negative aspects); see also U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 12: The Right to Food ¶ 15, U.N. Doc. E/C.12/1999/5 (May 12, 1999) (adopting the three duties to respect, protect, and fulfill the right to adequate food); Special Rapporteur on the Right to Food, *Report on the Right to Adequate Food as a Human Right*, U.N. Comm’n on Human Rights, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987) (by Asbjorn Eide) (further discussing these three duties).
- 15 Young, *Frame and Law*, *supra* note 2, at 192.

groups and environmental justice organizations oppose the pricing of medicines and the health impacts of pollution. Welfare rights groups and food security groups challenge nutritional services and food production conditions. Parental associations and civil rights organizations advocate for the entitlements of children to adequate education. And anti-poverty and legal aid lawyers seek to change the impact that poverty and inequality have on the aims of justice in the legal system. Anti-globalization and anti-capitalist movements also challenge the current forms of accountability in the state and in the market, in terms that raise all of these interests. When these social movements and associations adopt “rights talk” they belong within our study of the economic, social, and cultural rights frame.¹⁶ Sometimes such interests are expressed as raising parallel rights, such as the right to information which links farmers and patients in disputes around agricultural and medicinal intellectual property protections, or other civil and political rights campaigns that impact economic, social, and cultural concerns.¹⁷ To reject the relevance of such movements to the economic, social, and cultural rights frame is to ignore the indivisibility of such rights and to maintain problematic divisions and hierarchies that should be dispelled.

Nonetheless, the form and substance of this rights talk is not uniform or singular. A commonly understood genealogy of the rights to food, health, housing, education, social security, and work emphasizes international struggles for the recognition of material interests—struggles won in the formation of the United Nations after the upheavals of World War II, in the terms of the Universal Declaration of Human Rights of 1948,¹⁸ and later in the International

16 For further discussion, see KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* (forthcoming 2012) (manuscript at chs. 8–9) (on file with author) [hereinafter YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS*] (documenting current-day social movements utilizing economic and social rights).

17 See generally Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *YALE L.J.* 804 (2008) (describing the joint mobilization between college students, subsistence farmers, AIDS activists, genomic scientists, and free-software programmers in an “access to knowledge” (A2K) challenge to intellectual property law).

18 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

Covenant on Economic, Social and Cultural Rights.¹⁹ These are pivotal sources for the development of the legal language of economic, social, and cultural rights. Yet one could trace this genealogy back further, or locate the sources of economic, social, and cultural rights elsewhere. Indeed, the economic, social, and cultural rights frame may not necessarily privilege international human rights law, but instead reflect the contributions of political philosophy,²⁰ European social democracy,²¹ the “four freedoms” of the New Deal in the United States,²² or later constitutions that have outlined explicit social protections for citizens and others.²³ There is much diversity in the

-
- 19 International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].
- 20 See Sen, *supra* note 8 (discussing the use of political philosophy in creating a human rights frame); see also JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) (discussing the duties of justice as springing from philosophical thought); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) (applying Rawls' political philosophy theory to welfare rights in the legal realm). For sourcing such rights in a different political philosophy, see Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008) (applying a theory of distributive justice dependent upon the social meaning of each social good, held by MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983)).
- 21 SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 63–64 (2010) (emphasizing the presence of social rights in the French Revolution and in interwar European constitutions).
- 22 Elizabeth Borgwardt, *FDR's Four Freedoms and Wartime Transformations in America's Discourse of Rights*, in BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 31–47 (Cynthia Soohoo et al. eds., 2008); see also The Annual Message to the Congress (Jan. 6, 1941), in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, at 672 (Samuel I. Rosenman ed., 1941). For current endorsement of this genealogy, see President Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), in DAILY COMP. PRES. DOCS., Dec. 10, 2009, at 1, available at <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize> (noting freedom from want and fear ground the links between civil and political rights and economic security and opportunity).
- 23 E.g., INDIA CONST. pt. IV (protection of economic, social, and cultural rights as fundamental rights or as directive principles of state policy); S. AFR. CONST., 1996, art. 26–29, 35 (including protection of rights to access food, water, health care, housing, education, children's rights, and rights in detention); REP. OF GHANA CONST., 1992, ch. 6 (protection of economic and social rights as directive principles of state policy); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ch. 2 (protection of economic, social, and cultural rights).

potential use of this frame. Like the interior and exterior circles of a Venn diagram, there are many normative frames within the economic, social, and cultural rights frame.

III. Redemptive and Rejectionist Frames

Multiple sub-frames of interpretation, mobilization, and understanding can operate within the economic, social, and cultural rights frame. Two such frames may be demarcated by their redemptive and rejectionist stances towards law and the state. These I adapt from the work of Robert Cover, whose influential contributions to U.S. constitutional theory invite a reflection on the narratives and the normative frames that have attached and reattached to the U.S. Constitution over time.²⁴

Although Cover applied these labels to the constitutionalist movements of the 19th and 20th centuries²⁵—movements which were therefore agitating against a obdurate stock of laws in very different historical contexts—his prescriptions nevertheless offer an insight into present-day movements for economic, social, and cultural rights. While both redemptive and rejectionist movements refuse to acquiesce to current legal arrangements, this refusal takes on a different form in each. Below, I demarcate the two frames and analyze how they may illuminate the current practice around economic, social, and cultural rights in the United States and elsewhere.

A. Redeeming Law with Economic, Social, and Cultural Rights

A redemptive frame seeks to reinterpret laws in ways that may redeem their implications for justice.²⁶ If we consider redemption to be one of the sub-frames of economic, social, and cultural rights claims, we might say that social movements and advocates seek to introduce or reintroduce ideologies of distributive justice, based on a human rights reading of constitutional or other legal texts. Because

See also YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS, *supra* note 16, at chs. 5–7 (documenting the enforcement of such rights in these jurisdictions).

24 Cover, *supra* note 1.

25 Some of which, like the right-to-life movement and women's rights movement, continue today.

26 See Cover, *supra* note 1, at 33–35.

these ideologies, to be effectively recognized, cannot be contained within the social movement itself, they must be transformed into the surrounding social and legal world.²⁷ For Cover, a redemptive frame offers a way to “change the law or the understanding of the law.”²⁸

Cover offers four examples of redemptive politics in the United States—the antislavery movement, the civil rights movement, the women’s rights movement, and the right-to-life movement—all of which “set out to liberate persons and the law” by challenging accepted constitutional interpretations.²⁹ His first example is instructive. In challenging the legality of slavery, abolitionist leader Frederick Douglass refuted the orthodox interpretation of the U.S. Constitution that held that its terms permitted slavery. He and other anti-slavery constitutionalists engaged in an immense effort to redeem the very U.S. constitutional laws that permitted slavery. As Cover notes:

They worked out a constitutional attack upon slavery from the general structure of the Constitution; they evolved a literalist attack from the language of the due process clause and from the jury and grand jury provisions of the fifth and sixth amendments; they studied interpretive methodologies and self-consciously employed the one most favorable to their ends; they developed arguments for extending the range of constitutional sources to include at least the Declaration of Independence. Their pamphlets, arguments, columns, and books constitute an important part of the legal literature on slavery³⁰

While this approach was a short-term failure and failed to convince others of Douglass’ new interpretive vision, Cover suggests that it set in motion the “creative pulse” for new legal principles and justifications over the long term.³¹ This was in stark contrast to the strategies of other abolitionists, who accepted the interpretation of the Constitution that permitted slavery, consistent with the professional opinion of the day.³² For these other abolitionists, a constitution that

27 *Id.* at 34.

28 *Id.*

29 *Id.* at 35.

30 *Id.* at 39.

31 *Id.* at 38–39.

32 *Id.* at 36.

permitted slavery became the ground for rejecting any obligation arising under it—a rejectionist position detailed below.³³

Despite the enormous changes in law and in normative attitudes in the intervening years, parallels exist in these modes of arguments for economic, social, and cultural rights claims in the United States. As advocates know well, there are tactical and substantive implications in seeking to redeem the law. I suggest that these differ at the constitutional level, the statutory or common law (or “sub-constitutional”) level, and in the domain of international law. Below, I offer a brief (non-exhaustive and certainly not yet conclusive) sketch of the parameters of each.

1. *Possibilities of the Redemptive Frame*

A redemptive constitutional frame in the United States would seek a reinterpretation of the Constitution that has long been considered unorthodox. This frame might suggest that the Equal Protection Clause does, indeed, provide the sort of equal protection that requires a minimum standard of living for all,³⁴ or that the Due Process Clause calls for an affirmative requirement of government aid.³⁵ Both interpretations are at odds with current Supreme Court precedent and professional legal interpretations.³⁶ In the United States, a redemptive strategy may integrate a cultural and political strategy to promote a new long-term constitutional vision,³⁷ or an

33 See discussion *infra* Part II.B.

34 See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

35 See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 861, 864 (1986) (challenging the view that the U.S. Constitution contains no positive rights, and hinting at the potential of due process claims to set in place positive obligations).

36 *E.g.*, *Lindsey v. Normet*, 405 U.S. 56 (1972) (denying a fundamental right to housing); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (denying a fundamental right to education); *Harris v. McRae*, 448 U.S. 297 (1980) (rejecting a claim for equal Medicaid funding for childbirth and abortion by declaring that the government has no obligation to provide any medical funding at all); *DeShaney v. Winnebago Cnty. Dep’t of Soc. Serv.*, 489 U.S. 189 (1989) (refusing to accept an affirmative duty on government institutions to prevent child abuse by custodial parent).

37 See Frank Michelman, *Economic Power and the Constitution*, in *THE CONSTITUTION IN 2020*, at 45, 47, 52–53 (Jack M. Balkin & Reva B. Siegel eds., 2009) (advancing the implications of a vision of the U.S. Constitution with entrenched economic and social rights).

appointments strategy to change the composition of unsympathetic courts,³⁸ or a public interest litigation strategy to craft targeted and careful litigation in particular courts.³⁹

Given the current constitutional law in the United States, these strategies hardly promise short-term success. A different mode of countering the orthodox anti-economic, social, and cultural rights interpretations of the U.S. Constitution is to argue that such interpretations should not be given credence as the final say on constitutional meaning. For the latter strategy, modes of “decentering” the Supreme Court, and of suggesting the mutual authority of legislative or of pluralist constitutional interpretations, are available.⁴⁰ Issues of justiciability and enforcement, which have long presented obstacles in economic, social, and cultural rights recognition in the United States, would be sidelined in this strategy, as courts (or the Constitution’s formal amendment provisions) would no longer be viewed as the locus of constitutional change.⁴¹

Alternatively, redemption may focus on forms of legal protection offered by state constitutions, such as for interests in welfare, education, or health care.⁴² Litigation at this level to secure the promise of textual protections of economic, social, and cultural rights has met

38 For the legal realist acknowledgement of the role of the composition of the court on the acceptability of economic and social rights, see Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 23 (2005).

39 Despite the success of structural impact litigation in other campaigns, *see, e.g.*, RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1977), such a strategy would appear, at the present time, misguided, *see, e.g.*, Liu, *supra* note 20, at 206 (conceding that “no prudent advocate would bring this type of claim before the politically conservative Court now sitting”).

40 For a conception of constitutional law that rejects the final authority of the court, developed against the background theories of democracy-based constitutionalism, see MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

41 *Id.*; see also Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 Cal. L. Rev. 1027, 1027–28 (2004).

42 Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1139–40 (1999) (documenting provisions protective of welfare in N.Y. CONST. art. XVII, § 1; MICH. CONST. art. IV, § 51; MO. CONST. art. IV, § 37; N.C. CONST. art. XI, § 4; ALA. CONST. art. IV, § 88; KAN. CONST. art. VII, § 4; MONT. CONST. art. XII, § 3; WYO. CONST. art. VII, § 20; CAL. CONST. art. XVI, § 1).

with some success. New York's constitution contains a number of protections aimed at welfare, education, and health care and provides a particularly fertile example.⁴³ In *Campaign for Fiscal Equity, Inc. v. State*, litigants were successful in securing state constitutional rights to education.⁴⁴ The New York Court of Appeals ordered that the state provide "minimally adequate" physical facilities and "adequately trained" teachers based on the judicial evaluation of both "input" (teaching, facilities, and library resources) and "output" (test results, graduation, and dropout rates) factors.⁴⁵ Campaigns to amend state constitutions have also sought to introduce economic, social, and cultural guarantees. In the context of health care, a constitutional convention in Massachusetts sought to introduce a right to health care for all citizens, drawing on the earlier experience of the right

43 N.Y. CONST. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."); *see also* N.Y. CONST. art. XVII, § 1 ("The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."); *see also* N.Y. CONST. art. XVII, § 3 ("The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefore shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.").

44 *Campaign for Fiscal Equity, Inc. v. State (CFE I)*, 655 N.E.2d 661, 666 (N.Y. 1995) (declaring the right to education, which the state must provide to some measure); *Campaign for Fiscal Equity, Inc. v. State (CFE II)*, 801 N.E.2d 326, 348 (N.Y. 2003) (holding that the the court can direct the legislature to find the funds to provide a "sound basic education" and enact such reforms); *Campaign for Fiscal Equity, Inc. v. State (CFE III)*, 814 N.Y.S.2d 1 (N.Y. App. Div.), *aff'd as modified*, 8 N.Y.3d 14 (N.Y. 2006) (directing the state to implement the remedy in *CFE II* by funding N.Y.C. schools).

45 *CFE II*, 801 N.E.2d at 331-40.

to education in that state.⁴⁶ State constitutions may be a promising backdrop to the redemptive constitutional frame.⁴⁷

At the federal level, a redemptive sub-constitutional frame could point to the long-standing Medicaid, social security, and other federal legislative protections in the United States and could mount a normative claim of their natural extension to broader individuals and groups, as well as their privileged status over short-term legislative programs or retrenchments.⁴⁸ This strategy is also constitutionalist in that it argues that “constitutive commitments,” of which constitutional rights are a subset, have formed within the citizenry to create certain economic, social, and cultural rights as stable and inviolable duties on government.⁴⁹ These constitute “a concrete account of the nation’s understanding of what citizens [are] entitled to expect”⁵⁰ such that their violation would “amount to a kind of breach—a violation of a trust.”⁵¹ Similarly, a methodology of sorting “super-statutes” from ordinary statutes is one that relies on

46 Borrowing from the Supreme Judicial Court’s interpretation of education protections, the proposed amendment would have required the enactment and implementation of laws to ensure “no Massachusetts resident lacks comprehensive, affordable and equitably financed health insurance coverage for all medically necessary preventive, acute and chronic health care and mental health care services, prescription drugs and devices.” *The Health Care Amendment*, HEALTH CARE FOR MASS. CAMPAIGN, <http://www.healthcareformass.org/about/amendment.shtml> (last visited July 13, 2012). This was presented as a collective enforceable right, but not an individual entitlement to specific health services, treatments, or coverage. The amendment was not put to voters, due to lack of legislative support. *The Health Care Constitutional Amendment, ConCon Denies the Health Care Amendment a Final Vote on its Merits*, HEALTH CARE FOR MASS. CAMPAIGN, <http://www.healthcareformass.org/index.shtml> (last visited July 20, 2012). For an analysis of other states, see Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1348–68 (2010) (describing protections in Michigan, New York, North Carolina, Mississippi, South Carolina, Montana, and New Jersey).

47 See, e.g., Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 924 (2011).

48 This strategy draws guidance from CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 62–64 (2004) (stating that social security, although not granted by the Constitution, has become generally accepted as a “constitutive commitment” in the United States).

49 *Id.*

50 *Id.* at 64.

51 *Id.* at 62.

their longevity and import to claim a quasi-constitutional status.⁵² This viewpoint argues for a type of quasi-constitutional entrenchment for legislation that has advanced access to particular social goods, such as health care legislation.⁵³ Such a view is controversial given that no Congress is able to bind its successors; yet it is the acceptance of the people, rather than Congress, which creates this heightened status.

Alternatively, the sub-constitutional frame redeems what is most promising about current statutory arrangements, as well as the role of Congress to bring them about. This frame invites a strategy of lobbying for new protections, or for safeguarding the old, in health care, housing, or welfare programs.⁵⁴ Instead of seeking a legislative strategy of introduction or amendment, this strategy could focus on simply reinterpreting current legislation in line with economic, social, and cultural rights. Again, the sub-constitutional frame does not rely on courts as its singular mechanism and can encourage popular or cultural avenues of change to create the normative support for a social safety net or other protections.⁵⁵ Another sub-constitutional frame would advance economic, social, and cultural rights by changing interpretations of particular common law or private law arrangements, such as contract, tort, or property.⁵⁶

52 WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 7–8, 18 (2010).

53 See, e.g., Theodore W. Ruger, *Plural Constitutionalism and the Pathologies of American Health Care*, 120 *YALE L.J. ONLINE* 347 (2011), <http://yale-lawjournal.org/2011/3/21/ruger.html> (connecting the Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010) (to be codified in scattered sections of 42 U.S.C.), with other, pro-health security statutes).

54 E.g., *Id.*, at 347 n. 3 (describing 50 years of efforts by the federal government to entrench legislation supporting health security); see also Maria Foscarinis, *The Growth of a Movement for a Human Right to Housing in the United States*, 20 *HARV. HUM. RTS. J.* 35, 37 (2007) (describing the McKinney-Vento Act as the first major federal legislation to address homelessness).

55 Sunstein refers to these deep-seated norms as “constitutive commitments.” SUNSTEIN, *supra* note 48, at 61–65. Eskridge and Ferejohn refer to “the polity’s larger commitments,” which are contained outside of the Constitution’s text or Supreme Court doctrine. ESKRIDGE & FEREJOHN, *supra* note 52, at 15.

56 Helen Hershkoff, “Just Words”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 *STAN. L. REV.* 1521, 1522–23 (2010) (examining how the protections of economic and social rights in some U.S. state constitutions could influence state common law). Cf. S. AFR. CONST., 1996, § 39 (“When interpreting any legislation, and when developing the

Finally, a redemptive international frame in the United States seeks to reinterpret the role of international law in domestic law. This process encompasses several steps, as well as several alternatives, of which three are discussed below. The first, a positivist form of redemption, argues that developments in international custom have changed U.S. law to create obligations to respect economic, social, and cultural rights. This argument relies on two grounds: first, that the United States, following a monist approach, allows for international law to be binding within its domestic legal system;⁵⁷ and second, that particular economic, social, and cultural rights (such as those, perhaps, of the Universal Declaration of Human Rights) have become binding on all states.⁵⁸ Both grounds are highly controversial: monism is disputed in U.S. law, and, even if it were accepted, sufficient consensus on economic, social, and cultural rights is probably lacking at the international level.⁵⁹

The second form of internationalist redemption is also positivist. This agenda would stress the economic, social, and cultural obligations that rest on the United States as a signatory, if not a party, to the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶⁰ Unlike the obligations on parties, the obligations on signatories require the United States and other countries “to refrain from acts which would defeat the object and purpose of a treaty.”⁶¹ The argument, however, is only as strong as the obligatory structure for signatories—that is, substantively weak. A more straightforward

common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”); see also a discussion of redemptive common law interpretations in South Africa and other countries *infra* Part II.A.ii.

57 The Paquete Habana, 175 U.S. 677, 700 (1900).

58 See CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 3–5 (2003).

59 For an examination of both grounds, see Young, *Frame and Law*, *supra* note 2, at 198–201.

60 ICESCR, *supra* note 19. The United States became a signatory in 1979. Although there are presently no signs of a shift towards this Covenant, some support can be gleaned from the Obama administration. See, e.g., Michael H. Posner, Assistant Sec’y, Bureau of Democracy, Human Rights, & Labor, Address to the American Society of International Law: The Four Freedoms Turn 70 (Mar. 24, 2011), available at <http://www.state.gov/j/drl/rls/rm/2011/159195.htm> (emphasizing this as the “time to move forward” for the United States to embrace economic, social, cultural, civil, and political rights).

61 Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331.

reformist strategy is to concede the lack of current obligations on the United States, and to lobby for ratification of the ICESCR,⁶² or of other conventions, such as the Convention on the Rights of the Child, which recognize particular economic, social, and cultural rights.⁶³ Similarly, an internationalist redemptive argument is available that the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, contains economic, social, and cultural rights protections through its safeguarding of other rights, such as the right to equal protection of the laws.⁶⁴ The advocacy strategy that draws attention to (and hence “names” and “shames”) the United States in relation to present protections (or lack thereof) of economic, social, and cultural rights is already in place under the scrutiny procedures of the Human Rights Committee,⁶⁵ as well as under the Human Rights Council’s Universal Periodic Review, which examines the economic, social, and cultural rights of the Universal Declaration of Human Rights.⁶⁶

62 See Barbara Stark, *At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement*, 20 *TRANSNAT’L L. & CONTEMP. PROBS.* 107, 127–30 (2011) (prescribing ratification on a number of justice-serving and practical grounds).

63 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

64 Int’l Covenant on Civil and Political Rights, art. 2 § 1, art. 26, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

65 Under ICCPR, art. 40, parties must submit reports to the Human Rights Committee, a process in which NGOs may also participate. The United States has been examined during the 87th Session of the Human Rights Committee, which took place in July 2006. U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee, July 10–28, 2006, ¶¶ 10–11, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006). The United States has also prepared a report for examination at the 109th Session, to take place in October 2013. U.N. Human Rights Comm., Advanced Version, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fourth Periodic Report: United States of America, U.N. Doc. CCPR/C/USA/4 (Dec. 30, 2011). This report contains references to “equal protection” in education, health care, social services, and housing. *Id.* ¶¶ 55–76, 85–90. The report also references the rights of minorities to culture but does not explicitly mention economic, social, and cultural rights. *Id.* ¶¶ 485–501. See also ICCPR, *supra* note 63, arts. 2, 27.

66 The Universal Periodic Review was created through the U.N. General Assembly on March 15, 2006, by resolution establishing the Human Rights Council after the dissolution of the Human Rights Commission. G.A. Res. 60/251, U.N. GAOR, 60th Sess., Supp. No. 49, U.N. Doc. A/RES/60/251 (Apr. 3, 2006). *E.g.*, REPORT OF THE UNITED STATES OF AMERICA SUBMITTED TO THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS FOR

The third redemptive internationalist frame posits the relevance of international law in the interpretation of U.S. constitutional, statutory, and common law. Because this frame relies only on persuasive authority, how binding international commitments, based on whether treaties have been ratified or customs formed, is beside the point.⁶⁷ This position has been highly controversial among U.S. courts, even when expressly mounted as involving only relevant, rather than binding, authority.⁶⁸ Yet there are judges who do look to international law as a relevant set of norms, commitments, and practices when interpreting domestic law.⁶⁹ U.S. Supreme Court Justices have considered the way in which international law might elucidate economic, social, and cultural rights in the United States. Justice Marshall considered whether the “rights” framework of Article 25 of the Universal Declaration of Human Rights would assist in equal protection analysis.⁷⁰ He was, however, writing in a dissenting opinion in a different Supreme Court, in a very different time in U.S. jurisprudential history.

THE UNIVERSAL PERIODIC REVIEW (Aug. 2010), available at <http://www.state.gov/documents/organization/146379.pdf> (detailing the current protections and initiatives in relation to civil, political, economic, social, and cultural rights).

- 67 See also Katharine G. Young, *The World, Through the Judge’s Eye*, 28 AUSTL. Y.B. OF INT’L L. 27, 42–55 (2009) (discussing three justifications to the use of international law).
- 68 For a statement of the controversy with respect to U.S. constitutional law, see *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. OF CONST. L. 519, 520–25 (2005).
- 69 See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing the European Court of Human Rights); *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (drawing on international criticism of the death penalty); see also Melissa A. Waters, *Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007) (examining the judicial treatment of the ICCPR by the U.S. Supreme Court and four other jurisdictions).
- 70 *Dandridge v. Williams*, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting).

2. *Potential Drawbacks of the Redemptive Frame*

Although these constitutional, sub-constitutional, and international frames of legal redemption are currently viewed as unorthodox in the United States,⁷¹ they have been applied with respect to economic, social, and cultural rights in other countries.⁷² Redemptive constitutionalism has seen, for example, rights to health, food, education, and housing enforced in India, through an expansive interpretation of the right to life;⁷³ advocacy that in turn has helped spur a constitutional amendment to explicitly entrench the right to education as a fundamental right.⁷⁴ Redemptive common law interpretations guide courts in India and in South Africa.⁷⁵ A redemptive internationalist frame has also been applied in Colombia, as a means by which a constitutional right to health care is enforced.⁷⁶

-
- 71 See, e.g., William Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *FORDHAM L. REV.* 1821, 1824 (2000–2001) (describing the idea of framing welfare benefits as a constitutional right in the United States as “off the table” and “off-the-wall”).
- 72 These are described in YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS*, *supra* note 16 (documenting litigation and other advocacy campaigns in South Africa, Ghana, India, Colombia, and the United Kingdom).
- 73 See generally *Paschim Banga Khet Mazdoorsamity of Ors. v. State of W. Bengal*, (1996) 4 S.C.C. 37 (India) (deriving the right to emergency health care from the constitutional right to life); *Ahmedabad Mun. Corp. v. Nawab Khan Gulab Khan & Ors.*, (1996) 7 Supp. S.C.R. 548 (India) (right to life incorporated right to shelter and requirement of alternative housing for evictees).
- 74 *INDIA CONST.*, art. 21A, *amended by* The Constitution (Eighty-Sixth Amendment) Act, 2002. See also Jayna Kothari, *Social Rights Litigation in India: Developments of the Last Decade*, in *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* 171–72 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).
- 75 See Helen Hershkoff, *Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings*, in *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* 268, 289–97 (Varun Gauri & Daniel M. Brinks eds., 2008), discussing *LIC of India v. Consumer Education & Research Center*, (1995) 1 S.C.R. 349 (India) (finding that economic, social, and cultural rights altered the law of contract in relation to life insurance policies); see also *Maphango v. Aengus Lifestyle Properties (Pty) Ltd.*, 2012 (3) SA 531 (CC) (S. Afr.) (finding private law tenancy rights effected by economic and social rights via legislation).
- 76 Katharine G. Young & Julieta Lemaitre, *Follow the Money, Follow the Courts? What We Can Learn from the Comparative Fortunes of the Right to Health*, 26 *HARV. HUM. RTS. J.* (forthcoming 2013) (manuscript at 6–14) (on file with author) (discussing *Corte Constitucional [C.C.] [Constitutional Court]*, julio 31, 2008,

An internationalist frame is also available as a matter of law to every constitutional interpretation in South Africa, where international law must be considered in ongoing constitutional interpretation.⁷⁷

This short comparative survey of several states reveals the contingency of the success of the redemptive frame. The position of courts, and of the content and finality of court-based interpretations, is distinct in different constitutional systems, as are the legal relevance of international law and the cultural resonance of rights. All courts act in their own legal, political, and cultural context.⁷⁸ In the United States, just as elsewhere, the doctrines, forms of reasoning, and jurisdictional arguments that courts make are inevitably informed by state policies, the common law, institutional configurations of federal legislative and judicial systems, social fact, historical context, and the day-to-day understandings of all participants literate in local culture.⁷⁹

A central barrier to legal redemption in the United States is the current court-based interpretations of the Constitution, the current statutory and common law framework, and the limited role that international human rights law takes in the domestic legal system. Against this legal backdrop, the redemptive frame is, as it was for Douglass, likely doomed to short-term failure, particularly at the federal constitutional level. Moreover, short-term failure may bring with it significant long-term costs. Wrongheaded legal strategies can demobilize, enervate, and co-opt social movements and other associations as they seek to effect legal change. The strategy of

Sentencia T-760/08, the first decision to adopt guidelines to order the government to address the major problems in the health care system).

77 S. AFR. CONST., art. 39(1)(b).

78 For an extensive examination of the role conceptions of courts in Colombia, India, South Africa, the United Kingdom, and the United States, see YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS*, *supra* note 16, at chs. 5–7. For further comparisons, see *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* (Varun Gauri & Daniel M. Brinks eds., 2008); *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE*, *supra* note 74, at 172–261 (discussing the legal systems of India, South Africa, Canada, and Israel); *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR?* (Roberto Gargarella et al. eds., 2006) (further discussing specific case studies in countries including India, Hungary, Bolivia, and Angola).

79 See generally Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003) (describing the role of “constitutional culture” in changing constitutional meaning).

litigation, for example, costs time and resources and often disconnects the claims from the claimants themselves. Even other strategies that seek change in law—such as protest, education, or lay organizing—may themselves legitimate an unjust legal system. The literature on such effects, the hollow hope of courts and the myth of rights, is legion.⁸⁰ In short, redemption may be misguided, counter-productive, and co-optive. Does a rejectionist frame offer an alternative?

B. Rejecting Law on Grounds of Economic, Social, and Cultural Rights

A rejectionist frame may be contrasted with its redemptive counterpart by accepting rather than challenging the dominance of current, adverse interpretations of law, but using that acceptance as a basis to renounce or reject the authority of law. For Cover, the abolitionist William Lloyd Garrison provides an example of rejection. Garrison's pro-slavery interpretation of the Constitution was "consistent with the dominant professional methods of their day (and of our day as well)."⁸¹ Garrison used that interpretation as the basis from which to renounce the Constitution and the Union itself.⁸² Seeking insularity from the law and from the state, Garrison attempted to mount a perfectionist alternative so that those forced to live under such a "cursed" Constitution could in reality live outside of it.⁸³ They could renounce any obligation to government under this Constitution and retreat in a manner similar to religious sectarians.⁸⁴

How does rejection fit within the economic, social, and cultural rights frame as a strategy of advocacy and mobilization in the United States? There are in fact multiple strategies. Rejectionism could

80 E.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (presenting the influential thesis that the court-based strategies to generate reform for civil rights, abortion, and women's rights were failures); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (2d ed. 2004) (presenting an early analysis of how the "myth of rights" can be misleading for political change strategies).

81 Cover, *supra* note 1, at 36.

82 *Id.* at 36–37; see also J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1708–10 (1997) (contrasting the Garrison idea of the Constitution as "a covenant with death, and an agreement with hell" with Douglass' account of fidelity to a more just interpretation).

83 Cover, *supra* note 1, at 35–36.

84 *Id.* at 36.

oppose the authority of law in general (what we might call anarchist rejectionism) or oppose a particular law. Hence, a rejectionist frame applied to the U.S. Constitution would renounce the legitimacy of current interpretations, or indeed the potential of the text to secure any fundamental material interests of those living under it.⁸⁵ Rejectionism could also reject the economic, social, and cultural rights-infringing effects of the statutory or common law, not as a basis for seeking its change, but as a basis for acting outside of it. International law could be similarly opposed or else treated as an alternative to U.S. law.

As a political stance towards international law, a rejectionist frame could reject current, positivist international law—from the authority of the World Trade Organization to the United Nations human rights treaty system—and argue instead for a non-statist cosmopolitan order outside of the nation-state paradigm. Or, depending upon where one is standing, one might apply rejection only to domestic arrangements and call for a bolstering of international law, especially international humanitarian law, for assistance in the transformation of current arrangements.

A softer, less threatening, and non-anarchistic version of this argument is the legal pluralist view, an idea which runs through Cover's work as well as significant contemporary scholarship on postcolonial, international, and everyday law.⁸⁶ If multiple legal orders openly coexist, rejectionist frames are likely to have more appeal, as the aim is not to overthrow the system but to allow conflicting legal systems to coexist. Social movements utilizing this strategy could withdraw into private burden sharing or self-help relations. They may form voluntary collectives or cooperatives and call for "an independent domain of free social life where neither governments nor private markets are sovereign."⁸⁷ They may seek out a vision of transnational politics that transcends the statist boundaries of law but

85 Compare this perspective against Balkin, *supra* note 82, at 1733–36, which problematizes the fidelity held towards the U.S. Constitution by those seeking constitutional welfare rights.

86 E.g., BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* (2001) (presenting a framework where law and society center around a pluralist rather than rejectionist approach); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007) (discussing ways in which legal pluralism supports finding solutions in cases where conflict occurs among overlapping legal systems).

87 BENJAMIN R. BARBER, *A PLACE FOR US: HOW TO MAKE SOCIETY CIVIL AND DEMOCRACY STRONG* 4 (1998).

maintains its roots in the everyday interaction of marginalized groups, such as immigrants, and across networks of families, churches, and schools.⁸⁸ For example, scholars writing about the geography of social relations have described forms of collective association that do not aim for institutional power or the reform of law, but are instead content with building their own “visibility” and “presence.”⁸⁹

Yet this pluralist retreat may accompany a decline in the relevance of the state.⁹⁰ Indeed, the strategy risks reinforcing the account of law that has created the material insecurity in the first place—that the state is no longer able to provide security and rights in the contemporary economy.⁹¹ Moreover, such a strategy may be grounded in a willful ignorance of the privileges and immunities that have been established by present-day legal arrangements. And it may be radically opposed to economic, social, and cultural interests. It is therefore incorrect to demarcate rejectionism as immune to co-optation. Indeed, a tendency to delineate radicalism and reformism as a marker of a movement’s attitude to law is misguided. Redemption may be radically transformative or incremental; rejectionism may be transformative at the insular, associational level, but may do nothing to disturb outer legal relations, or it may mount the rallying cry to topple a President.⁹²

IV. The Choice of Frame

Social movements often contain both redemptive and rejectionist strands of advocacy. An example is the current Occupy Wall Street movement. The movement has not issued a set of unified demands. Its “horizontal” organizing structure, which seeks input and consensus

88 See SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* 5–26 (1998) (describing a transnational political system extending beyond a single national or state system).

89 Orly Lobel, *The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 965–66 (2007).

90 *Id.* at 966.

91 Lobel contrasts several understandings of co-optation, including concerns about resources and energy, framing and fragmentation, lawyering and professionalism, crowding-out effects, institutional limitations, and the legitimization of existing social arrangements. *Id.* at 948–59.

92 The grassroots movement in Egypt took just 18 days to oust President Hosni Mubarak and end his 30-year reign. See Scott Peterson, *Egypt’s Revolution Redefines What’s Possible in the Arab World*, CHRISTIAN SCI. MONITOR, Feb. 11, 2011.

from all who are present, privileges participation and inclusion over the unity of frame. The motivations are eclectic, although they tend to be directed to the fairness of the economy and the representativeness of democracy. Typically, the movement has challenged both income inequality and corporate influence in government.

Many of the core organizers of the Occupy movement subscribe to anarchism: “to the eradication of any unjust or illegitimate system. At the very least, that means the eradication of capitalism and the state.”⁹³ Others have described Occupy Wall Street as a “human rights movement,”⁹⁴ and still others as an incipient popular constitutionalist movement with a redemptive agenda (for example, to wrestle the U.S. Constitution back from “the malefactors of great wealth” who benefit disproportionately from current arrangements).⁹⁵ It is too early to categorize this movement, suffice to note that the call for a representation of “the 99%,” as opposed to the “1%” who benefit from the global capitalist system may suggest a transnational alliance. Other Occupy movements, from Egypt, Greece, Spain, the United Kingdom, and elsewhere have also sought the common use of public space to express demands about the economy and democracy.⁹⁶ If demands for equality and redistribution enter the rights frame, we may well see the adoption of economic, social, and cultural rights talk.

Nonetheless, the choice is contingent on background political and legal arrangements. Redemptive frames for economic, social, and cultural rights in the United States are clearly more challenging than, for example, those in South Africa, where the text of the Constitution gives explicit support for economic, social, and cultural rights and invites an ongoing practice of legal transformation.⁹⁷ Equally, rejectionist frames for economic, social, and cultural rights may

93 Interview with “P” cited in Mattathias Schwartz, *Pre-Occupied*, *NEW YORKER*, Nov. 28, 2011, at 8. In the two-month occupation of Wall Street in New York, Schwartz describes the ideologies expressed as ranging “from ‘Daily Show’ liberalism to insurrectionary anarchism.” *Id.*

94 E.g., Jimmy Breslin, *People Rise, Cops Blink and a Human Rights Movement Takes Root in a New York Park*, *DAILY NEWS*, Oct. 16, 2011.

95 Jack Balkin, *Occupy the Constitution*, *BALKIN.COM* (Oct. 19, 2011, 8:31 AM) <http://balkin.blogspot.com/2011/10/occupy-constitution.html>.

96 See JOSEPH STIGLITZ, *THE PRICE OF INEQUALITY* ix-xiv, xix-xxi (2012).

97 S. AFR. CONST., art. 26 (housing), art. 27 (health care, food, water, and social security), art. 29 (education); see SANDRA LIEBENBERG, *SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION* xxi, ch. 1 (2010) (providing a commentary on the South African Constitutional Court’s developing jurisprudence on these rights).

appear more apt to Syrians than to Americans where the dangers of co-optation, as well as the overall effectiveness and appeal of rejection, will be different.

I suggest that, for the United States, redemption is a more viable strategy than rejection and that three constraints accompany this choice. The analysis of these constraints serves to orient a series of thought-experiments to be applied to redemptive strategies. First, the redemptive frame should be focused on transformative, rather than solely ameliorative, changes in law. The targets for economic, social, and cultural rights should be the root causes and deep structures underlying poverty and inequality. A rights frame is susceptible to falling into an ameliorative paradigm of the liberal welfare state, which may compromise its effectiveness and increase the dangers and levels of co-optation. Small gains may result in only stigmatizing, particularistic forms of government largess. Such results are particularly vulnerable to political backlashes against rights claimants, because of perceptions of inefficiency or an unfairness of state attention and the “undeserving” status of the poor.⁹⁸ Instead, a focus on transformed political and economic relations, which posits a new direction of change to current social, political, and economic institutions, is one that engages an expansionist vision, even if the first steps along the trajectory of transformation may be piecemeal or incremental.⁹⁹

Second, the redemptive frame should acknowledge the possibility of counterclaims in rights discourse, especially those that rely on the invisible background structures of liberal legal systems. Because rights rely on contestable, malleable, and morally laden concepts, they invite counterclaims, especially by dominant groups. Claimants must be aware of the other rights upheld under the same laws that may be the focus of redemption. A counterclaim may also exist by an alternative economic, social, and cultural rights frame. Clean air advocates may line up against the interests of workers in contesting air pollution laws; both may have a theory of the right to health,

98 See generally NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE (Joel Golb et al. trans., 2003) (exploring the tensions between paradigms of equal distribution and the struggle for recognition).

99 See generally MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORMS AND THE POLITICS OF LEGAL MOBILIZATION (1994).

through either the air they breathe or the food and medical care they can afford through employment.¹⁰⁰

Third, the frame should manage the institutional pull of rights claims towards litigation or courts, at both the national and international levels. As indicated above, courts are allies in very particular (and always contingent) political settings. Hence, a redemptive frame may use the leverage of courts when it is open. And it may acknowledge that courtroom failures may be successful for an ongoing rights strategy.¹⁰¹ Political advocacy, education, public protest, and mobilization, however, are also part of an economic, social, and cultural rights frame, and may be equally counted as “law talk.”

V. Conclusion

This article has delineated two frames for economic, social, and cultural rights advocacy and mobilization in the United States. These two models of redemption and rejection take different stances towards law, and towards the state, that may be incorporated into rights talk. The redemptive and rejectionist frames react differently to present constitutional, statutory, common, and international law. As each frame refuses to acquiesce to current laws, each also appeals to the dignity or worth of all. In contrast to popular understandings of political strategies, which depict a linear relationship between radicalism and reform, this article suggests that both frames may be incremental or transformative, and may be equally compromised by co-optation. With due awareness given to the inevitability of backlash, counterclaims, and the pull to litigation, the combination of “law talk” and “rights talk” is a useful strategy for the protection of economic, social, and cultural rights in the United States.

100 See, e.g., John M. Broder, *Re-election Strategy Is Tied to a Shift on Smog*, N.Y. TIMES, Nov. 17, 2011, at A1 (detailing regulatory battles over stronger ozone standards; in opposition, administrators from North Carolina had contended that a “lack of employment, loss of health care, and in some cases, loss of a home, also affect the health of our citizens”).

101 See STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY (Lucie White & Jeremy Perelman eds., 2011) (discussing pragmatic strategies of rights advocacy and litigation in Africa, including those capitalizing on courtroom failure).